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JUDGE APPROVED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXCELLER SOFTWARE CORPORATION, :

Plaintiff, :

vs. :

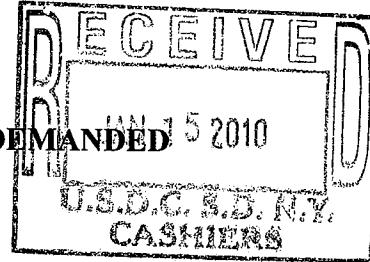
PEARSON EDUCATION, INC. and
 ADDISON-WESLEY LONGMAN, INC., :

Defendants :

No.

COMPLAINT

JURY TRIAL DEMANDED



Plaintiff Exceller Software Corporation (“Exceller”), by its undersigned attorneys, for its complaint against Defendants Pearson Education, Inc. (“Pearson”) and Addison-Wesley Longman, Inc. (“Addison-Wesley” and together, “Addison-Wesley/Pearson”), alleges as follows:

Nature of Action

1. Exceller is a software company engaged in the development and distribution of educational software in the United States and worldwide. Beginning in the second half of 1993, Exceller collaborated with Addison-Wesley towards the development of a computer software program on CD-ROM for instruction in English as a Second Language (“ESL”) called “Focus on Grammar” (“FOG” or the “Software”). After collaborating together jointly for over a year for the development of the software (as a series of four separate modules for different levels of instruction), the parties formalized their relationship in a Software

Development Agreement dated December 22, 1994 (the "SDA"), a copy of which is attached hereto as Exhibit 1.

2. Exceller's contribution consisted of software design and software architecture, design of the user interface, programming code, and product concept. Pearson's contribution was the content, that is text files, graphic files and sound files. In the SDA, the parties agreed that they would hold the copyright in FOG jointly. In addition, the parties agreed that Exceller as the Developer of the Software would make "major enhancements" to the Software "upon separate and mutually agreeable terms."

3. Exceller and Addison-Wesley subsequently introduced the FOG software for sale in the United States and worldwide. The software was well-reviewed and very successful in the marketplace. Exceller and Addison-Wesley had separate rights to market and sell FOG.

4. Notwithstanding its contractual obligations, Addison-Wesley (and, on information and belief, Pearson as its successor in interest) separately developed a new version of FOG incorporating major enhancements as defined in the SDA. That new software, called Focus on Grammar Interactive ("FOGi") has effectively replaced FOG in the marketplace. FOGi is a derivative work of FOG.

5. Notwithstanding its obligations as a joint owner, under the Copyright Act as well as by contract, of the copyright in FOG, Addison-Wesley/Pearson has failed to account to Exceller for Exceller's share of the profits from FOGi.

6. Addison-Wesley/Pearson's breaches have seriously damaged Exceller.

Parties

7. Exceller Software Corporation is a New York corporation, with an address at 10999 Reed Hartman Hwy., Suite 309C, Cincinnati, Ohio 45242

8. On information and belief, Addison-Wesley Longman, Inc. is a Massachusetts Corporation with an office at 1 Lake Street, Upper Saddle River, New Jersey 07458. Addison-Wesley is registered to do business in New York State. Addison-Wesley was formerly named Addison-Wesley Publishing Company, Inc.

9. On information and belief, Pearson Education, Inc. is a Delaware corporation with an office at 1 Lake Street, Upper Saddle River, New Jersey 07458. Pearson is registered to do business in New York State. On information and belief, Pearson is the successor in interest to Addison-Wesley.

Jurisdiction and Venue

10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1338, as this case arises under the Copyright Act of 1976. The Court has supplemental jurisdiction over Exceller's state law claims pursuant to 28 U.S.C. § 1337.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 as Defendants are subject to personal jurisdiction in this district.

Exceller and Addison Wesley/Pearson Jointly Develop FOG

12. In 1993, Exceller completed the development of software for English as a Second Language ("ESL") called "English Tutor." That software was developed in conjunction with extensive work with academic experts in ESL instruction.

13. In the second half of 1993, representatives of Exceller met and corresponded with representatives of Addison-Wesley/Pearson to discuss the collaborative development of an ESL software product for joint ownership. At that time, Exceller was not aware of Pearson's work in process for a printed series of ESL course books that Addison-Wesley/Pearson was developing, called Focus on Grammar.

14. Exceller demonstrated the English Tutor software to representatives of Addison-Wesley/Pearson. Addison-Wesley/Pearson subsequently specified that the user interface for FOG should be the same as in Exceller's English Tutor.

15. The parties collaborated throughout the remainder of 1993 and 1994 towards the establishment of product requirements of FOG. In particular, Exceller provided Addison-Wesley/Pearson with substantial product concept ideas with respect to integrating skills of Read, Write, Listen and Speak into the teaching of English grammar, the structure of the software and unique form of feedback to the user, types of exercises as included in English Tutor and the user interface as used in English Tutor.

16. Exceller also convinced Addison-Wesley/Pearson to agree to the use of multimedia technology for the Software, rather than pure text based exercises to be distributable on flexible (floppy) disks. Exceller was the driving force behind the "interactivity" the parties incorporated in FOG, which was a key factor in its success in the marketplace.

17. The parties entered into the SDA, effective December 22, 1994, although actual software development commenced in August, 1994.

18. Section 3 of the SDA provides:

3.) OWNERSHIP OF RIGHTS

a.) The print form of the Work is the property of the Publisher and has been registered in the US Copyright Office under the Publisher's name. Ownership of all content material in the software packages shall be the Publisher's.

b.) The copyright and ownership of the Software engine shall be the Developer's.

c.) Copyright in the Software product of the Work shall be jointly held and shall be registered according to 3.a. and 3.b. herein.

19. The SDA demonstrates that Addison-Wesley/Pearson and Exceller intended their separate contributions to be merged into inseparable or interdependent parts of a unitary whole. The Software product of the Work was thus a joint work under 17 U.S.C. § 101.

20. In 1996 and 1997, Exceller and Pearson released the following FOG modules:

- Focus on Grammar CD-ROM Basic
- Focus on Grammar CD-ROM Intermediate
- Focus on Grammar CD-ROM High Intermediate
- Focus on Grammar CD-ROM Advanced

21. The FOG series has been very popular in the marketplace and economically successful.

Addison-Wesley/Pearson Breach the SDA by Developing FOGi Without Exceller

22. Addison-Wesley/Pearson has now introduced FOGi. FOGi is available for sale in CD-ROM as well as web-enabled online versions used over the Internet. The product titles for the CD-ROM versions of FOGi are:

- Focus on Grammar Interactive CD-ROM Level 1
- Focus on Grammar Interactive CD-ROM Level 2
- Focus on Grammar Interactive CD-ROM Level 3
- Focus on Grammar Interactive CD-ROM Level 4
- Focus on Grammar Interactive CD-ROM Level 5

The product titles for the online versions of FOGi are:

- Focus on Grammar Interactive Level 1 Online
- Focus on Grammar Interactive Level 2 Online
- Focus on Grammar Interactive Level 3 Online

- Focus on Grammar Interactive Level 4 Online
- Focus on Grammar Interactive Level 5 Online

23. FOGi Level 1 is a new level. Thus, FOG Basic correlates to FOGi Level 2, FOG Intermediate correlates to FOGi Level 3, FOG High Intermediate correlates to FOGi Level 4 and FOG Advanced correlates to FOGi Level 5.

24. The SDA provides, with respect to enhancements of the Software:

5.) ENHANCEMENTS.

The Developer will maintain the Software and provide bug fixes at no charge. Any other major enhancement, such as incorporating interactive video or providing bilingual translation, will be upon separate and mutually agreeable terms which may include further investment commitments.

25. FOGi includes and constitutes “other major enhancements” to FOG.

Among other things, FOGi incorporates localization of the software for use in foreign countries, which in the SDA is referred to as “bilingual translation,” “with respect to the help system and some of the menu prompts. Other enhancements included in FOGi that were contemplated and identified by both parties in their collaboration are the addition of Speak exercises and the addition of a glossary.

26. Addison-Wesley/Pearson developed FOGi without informing Exceller that it was developing FOGi, and did not enter into an agreement with Exceller on separate and mutually agreeable terms to develop these enhancements.

27. Addison-Wesley/Pearson thus breached the SDA in developing each level of the FOGi CD-ROM versions as well as the Internet-delivery based “Online” versions.

The FOGi Levels are Derivative Works of FOG Modules

28. FOGi is substantially similar to FOG in, among other things, its menu structures, user interface, sequencing of activities and sequencing of exercise types, user instructions and user feedback. In fact, the interactivity of FOG and FOGi is virtually identical.

29. These and other elements of FOG, copied in FOGi, constitute copyrightable expression.

30. In addition, on information and belief (other than FOGi Level One), FOGi contains over 50% or more of the content of FOG.

31. On information and belief, certain FOGi media refer to themselves as “Version 2.0.” On information and belief, there was no FOGi version 1, and the version 1 referred to in the FOGi media is FOG.

32. FOGi is a recasting, transformation or adaptation of FOG, or in the alternative consists of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship. FOGi and the individual FOGi levels are thus derivative works of FOG, as defined in 17 U.S.C. § 101.

Addison-Wesley/Pearson Has Used FOGi to Compete Unfairly with Exceller

33. The SDA gave both Exceller and Addison-Wesley/Pearson extensive rights to sell FOG. Section 8 of the SDA provides that both Exceller and Addison-Wesley/Pearson have the right to “market, promote and sell the Software throughout the world.”

34. Exceller sold FOG to, among others, individual users, persons in the retail market and foreign educational institutions.

35. FOGi on CD-ROM is sold in the same configuration as FOG – single user, 5-pack, 10-pack, 20-pack and network license. FOGi’s packaging uses colors similar to those

used by FOG for corresponding levels. In addition, on information and belief, the text used in advertising for FOGi incorporates much of the text used in advertising for FOG.

36. In developing and introducing FOGi as the successor to and improvement upon FOG, Addison-Wesley/Pearson is competing unfairly with Exceller, cutting Exceller out of markets that it was bound by contract and as a tenant in common of FOG to respect.

37. In order to compete unfairly with Exceller, Addison-Wesley/Pearson acted in bad faith by, among other things:

- Failing to enter into the agreement for other major enhancements contemplated in Section 5 of the SDA;
- Using the very similar name Focus on Grammar Interactive to evoke Focus on Grammar and suggest that the new product was a continuation and enhancement of FOG;
- Utilize packaging and advertising similar to FOG for FOGi; and
- Marketing FOGi in the same markets as FOG, including markets in which Exceller sells FOG, to perform the same function and be used for the same purpose as FOG.

Count I
(Declaratory Judgment)

38. Plaintiff repeats and realleges paragraphs 1 through 37 as if fully restated herein.

39. There is an actual controversy between Exceller and Addison-Wesley/Pearson as to whether FOG is a joint work of authorship under the Copyright Act, 17 U.S.C. § 101.

40. Addison-Wesley/Pearson and Exceller intended their separate contributions to FOG to become an inseparable or interdependent whole.

41. As a result, Exceller is entitled to a declaration that FOG is a joint work of authorship, with Exceller and Addison-Wesley/Pearson as joint authors.

42. There is an actual controversy between Exceller and Addison-Wesley/Pearson as to whether FOGi, collectively or as to each level, is a derivative work of FOG, collectively or as to each module.

43. FOGi, collectively and individually, is a recasting, transformation or adaptation of FOG, or in the alternative consists of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship. FOG and the individual FOGi levels are thus derivative works of FOG, as defined in 17 U.S.C. § 101.

44. FOGi, and each of its levels, are therefore derivative works of FOG.

45. As a result, Exceller is entitled to a declaration that FOGi, and each level of FOGi, is a derivative work of FOG.

**Count II
(Accounting)**

46. Plaintiff repeats and realleges paragraphs 1 through 45 as if fully restated herein.

47. As joint authors, each of Exceller and Addison-Wesley/Pearson is entitled to create derivative works from FOG, subject to a duty to account to the other its profits from such work.

48. FOGi, collectively and as to each FOGi level, is a derivative work of FOG.

49. Addison-Wesley/Pearson is therefore obligated to account to Exceller for Exceller's share of the profits from sales or licenses of FOGi. Addison-Wesley has failed and refused to do so.

50. Exceller is therefore entitled to an accounting of profits from Addison-Wesley/Pearson with respect to FOGi.

**Count III
(Breach of Contract)**

51. Plaintiff repeats and realleges paragraphs 1 through 37 as if fully restated herein.

52. FOGi incorporates "other major enhancements" to FOG, as defined in Section 5 of the SDA.

53. Addison-Wesley/Pearson failed to enter into, or to negotiate in good faith for, separate and mutually agreeable terms for Exceller to make such other major enhancements.

54. Addison-Wesley/Pearson has therefore breached Section 5 of the SDA.

55. Addison-Wesley/Pearson has also breached Section 8 of the SDA.

Addison-Wesley/Pearson in introducing FOGi has failed to take due care to respect Exceller's primary markets and traditional customers and to compete fairly with Exceller.

56. Addison-Wesley/Pearson's breach of Section 8 of the SDA has caused Exceller's sales of FOG to drop substantially.

57. Exceller has been damaged by Addison-Wesley/Pearson's breaches of contract

58. Exceller is entitled to judgment against Addison-Wesley/Pearson in an amount to be determined at trial.

**Count IV
(Unfair Competition)**

59. Plaintiff repeats and realleges paragraphs 1 through 37 as if fully restated herein.

60. Addison-Wesley/Pearson, in bad faith and intentionally, developed FOGi in order to supersede FOG and appropriate the market for FOG to itself.

61. Addison-Wesley/Pearson has sought to trade off FOG's reputation in the marketplace by using a confusingly similar name for FOGi.

62. That confusion has been enhanced by Addison-Wesley/Pearson's use of packaging and design for FOGi that is similar to FOG. In addition, Addison-Wesley/Pearson's advertising materials for FOGi use similar language as used for FOG. On information and belief, Addison-Wesley/Pearson no longer sells FOG.

63. Addison-Wesley/Pearson markets and sells FOGi in the same market as FOG, including markets in which Exceller sold FOG.

64. Addison-Wesley/Pearson has engaged in unfair competition

65. Exceller has been damaged by Addison-Wesley/Pearson's unfair competition, in an amount to be determined at trial.

WHEREFORE, Plaintiff Exceller Software Corporation is entitled to judgment against Pearson Education, Inc. and Addison-Wesley Longman, Inc.:

- (a) on Count I, declaring that FOG is a joint work of authorship;
- (b) on Count II, granting Plaintiff an accounting of profits from Defendants with respect to FOGi;
- (c) on Count III, for damages in an amount to be determined at trial;
- (d) on Count IV of the Complaint, for damages in an amount to be determined at trial;
- (e) awarding Plaintiff its attorneys fees, costs and expenses; and
- (f) granting such other, further and different relief as the Court determines is just and proper.

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